In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, PETITIONER
v.
O. B. FISH
} No. ——

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS, AND BRIEF IN SUPPORT THEREOF

The United States prays for a writ of certiorari directed to the United States Court of Customs Appeals to bring before this Court for review the decision and judgment rendered by the United States Court of Customs Appeals on the 28th day of June, 1924, in the case entitled "*O. B. Fish, Appellant,* v. *The United States, Appellee,* No. 2266."

This petition is filed pursuant to section 195 of the Judicial Code, as amended.

On the 25th day of March, 1924, prior to the decision of the Court of Customs Appeals, the Attorney General of the United States duly filed in the office of the Clerk of the Court of Customs Appeals a certificate under Section 195 that, in his opinion, this case is of such importance as will render expedient its review by the Supreme Court of the United States.

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THE FACTS

The respondent herein filed two petitions for the remission of additional duties imposed by the Collector of Customs at the port of New York. The petitions were tried together by the Board of General Appraisers and denied by said Board. The respondent thereafter, on or about April 5, 1923, appealed to the Court of Customs Appeals from the decision of the Board of General Appraisers, basing its right to such appeal on the language of sections 195 and 198 of the Judicial Code, as amended.

Thereafter and on or about the 28th day of July, 1923, the United States, appellee, duly moved that the said appeal be dismissed by the Court of Customs Appeals upon the ground that that court had no jurisdiction to entertain the same. The motion to dismiss the appeal, as well as the issues raised by the appeal itself, were duly argued before the Court of Customs Appeals, which court on the 28th day of June, 1924, rendered its decision denying the motion of the United States to dismiss the appeal (Smith J. dissenting), and also rendered its decision upon the issues involved in the appeal by reversing the judgment of the Board and remanding the case to the Board of General Appraisers for a new trial.

THE ISSUE

Has the Court of Customs Appeals jurisdiction to entertain appeals from decisions granting or denying petitions for the remission of additional duties filed under section 489 of the tariff act of 1922 (42 Stat. 858, c. 356)?

IMPORTANCE OF ISSUE

Nineteen hundred petitions for remission of additional duties under section 489, *supra*, have been filed with the Board of General Appraisers. Over twelve hundred are now pending undetermined. The importance of an early determination of this question to prevent congestion of the dockets and a possible waste of time seems to us to justify this application for a writ of certiorari.

JAMES M. BECK,
Solicitor General.
WM. W. HOPPIN,
Assistant Attorney General.

SEPTEMBER, 1924.

BRIEF IN SUPPORT OF PETITION

The decision of the Board of General Appraisers on a petition for remission of additional duties does not raise an "appealable question."

The Court of Customs Appeals bases its decision denying the motion of the Government to dismiss on sections 195 and 198 of the Judicial Code which, so far as material, read:

> (195) The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such

> classifications, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases. * * *
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> (198) If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision. * * *

The United States submits that that court had no jurisdiction to entertain such an appeal. Being an inferior United States Court it has only such jurisdiction as has been specifically granted to it by statute, and nothing in the two sections above set forth in which the jurisdiction of the Court of Customs Appeals is delimited grants jurisdiction in such a case.

The tariff act of 1922 for the first time has granted importers a method of relief from the imposition of

additional duties in section 489. That section, so far as material, reads as follows:

> (489) * * * Such additional duties shall not be construed to be penal and shall not be remitted nor payment thereof in any way avoided, except in the case of a manifest clerical error, upon the order of the Secretary of the Treasury, *or in any case upon the finding of the Board of General Appraisers, upon a petition filed and supported by satisfactory evidence under such rules as the board may prescribe, that the entry of the merchandise at a less value than that returned upon final appraisement was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise.* * * * Upon the making of such order or finding, the additional duties shall be remitted or refunded, wholly or in part, and the entry shall be liquidated or reliquidated accordingly. (Italics ours.)

The Court of Customs Appeals in its decision holds that the decision of the Board of General Appraisers on such a petition is a final decision, and under the language of section 195, *supra*, the appellate jurisdiction of that court as to "final decisions, by the Board of General Appraisers in all cases as to the construction of law and facts" and "all appealable questions as to the law and regulations governing the collection of customs duties" is sufficient to give that court jurisdiction.

Nothing in section 489 of the tariff act of 1922 specifically grants jurisdiction to the Court of Customs Appeals. This becomes important when it is noted that in other cases in which the tariff act of 1922 has prescribed rights to the importers additional to those theretofore given to them under prior acts, it has in each case specifically provided for an appeal to the Court of Customs Appeals.

Thus in section 316 of the act of 1922, providing for certain powers of the President and of the United States Tariff Commission, an appeal is authorized from the findings of such Commission upon questions of law to the United States Court of Customs Appeals.

In section 501, providing for the method of reappraisement of merchandise, it is stated that the decision of the Board of General Appraisers thereunder shall be final and conclusive upon all parties unless appeals shall be taken to the Court of Customs Appeals in accordance with section 198 of the Judicial Code, above quoted.

In section 515, the right of appeal to the Court of Customs Appeals is given from decisions of the collector, as set forth in section 514 of the act, which latter section has broadened the right of protest in many cases, including decisions of the collector as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury); his decisions excluding merchandise under any provision of the customs law; his refusal to pay any claim for drawback, as to none of which is there a right to protest under prior acts.

In section 516 (c) the right of either party to appeal to the Court of Customs Appeals is given in cases where an American producer has filed a protest, which is a new right never before given in tariff acts.

In section 517 a right of appeal to the Court of Customs Appeals is given where a penalty has been imposed upon a protestant for filing a frivolous protest.

Under section 563 a right of appeal is given to either party to the Court of Customs Appeals on claims for allowance for injury or destruction of merchandise while in bonded warehouse or other customs custody.

Thus it is noted that in cases where Congress intended the Court of Customs Appeals to have jurisdiction over new rights granted to importers in the tariff act of 1922, specific jurisdiction over appeals involving such rights has been distinctly granted.

Necessarily the Judicial Code, sections 195 and 198, *supra*, could have had no application as to petitions for remission of additional duties because at the time of the passage of the Judicial Code there was no such right reserved to an importer.

It seems clear, therefore, that there is no direct grant of authority to the Court of Customs Appeals to review such decision. The court bases its determination upon the fact that the decision of the Board of General Appraisers is a final decision, but it is to be noted that in section 195 the jurisdiction given to the court is not to review *all* final decisions, but to review final decisions of the Board of General Ap-

praisers in all cases "as to the construction of the law and the facts respecting the classification of merchandise and the rate of duties imposed thereon under such classification and the fees and charges connected therewith." The decision of the Board of General Appraisers in this case refusing the petition for remission of additional duties under section 489, *supra*, has nothing to do with the classification of merchandise or the rate of duty imposed thereon at all, but is distinctly limited to one question: Did the importer enter the merchandise at a value less than that returned upon final appraisement without any intention to defraud the revenue or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise?

It is to be noted in this connection that any petition for remission of additional duties is based upon the correctness and the finality of the order of the appraising officers finally appraising the merchandise and that its correctness neither is nor can be in any way impugned. The granting of the petition would not mean that the additional duties were incorrectly imposed, but only that they should be remitted. The further portion of section 195 reading:

> all appealable questions as to the law and regulations governing the collection of customs revenue

and that portion of section 198 which prescribes the procedure upon an appeal to review a decision

> as to the construction of the law and the facts respecting the classification of such merchan-

> dise and the rate of duty imposed thereon under such classification *or with any other appealable decision of said board*

clearly can apply only to such questions in which the Court of Customs Appeals has been given statutory jurisdiction to review. For no other reason, it is submitted, was the direct right to appeal specifically granted in the sections of the act of 1922, above quoted, than to make such questions "appealable questions" under said section 195. Without such a determination by Congress that such questions were appealable, the court would have had no jurisdiction to entertain appeals involving such questions.

II

The Court of Customs Appeals, being an inferior court, has no other or greater jurisdiction than that which Congress apportions to it. This has been held many times

Thus in *United States ex rel. Maxwell* v. *Barrett*, 135 Fed. 189, 193, it was said:

> National courts inferior to the Supreme Court are clothed with such powers as Congress has conferred upon them. The doctrine, negatively expressed, is that such courts have no other or greater jurisdiction than that which Congress apportions to them. The potential power ceded to the United States by section 2 of article 3 of the Constitution may be called into exercise by Congress, which possesses the right to establish inferior courts, and to partition among them all or any

> part of the judicial powers not vested in the Supreme Court. Courts created by Congress can exercise such powers only as are expressly conferred upon them. They can not take jurisdiction by mere implication. They have no jurisdiction by intendment. *Harrison* v. *Hadley*, 2 Dill. 229, Fed. Cas. No. 6137; *Ex parte Cabrera*, 1 Wash. C. C. 232, Fed. Cas. No. 2278; *Bank* v. *Roberts*, 4 Conn. 323, Fed. Cas. No. 934; *United States* v. *Alberty*, Hempst. 444, Fed. Cas. No. 14426. In *Turner* v. *Bank*, 4 Dall. 8, 1 L. Ed. 718, the court said: "A Circuit Court, however, is of limited jurisdiction, and has cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases, which an unlimited jurisdiction would embrace. *And the fair presumption is not, as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather that a cause is without its jurisdiction till the contrary appears.*" [Italics ours.]

In *United States* v. *Mar Ying Yuen*, 123 Fed. 159, at page 160, the court quotes Chief Justice Marshall in *United States* v. *More*, 3 Cranch, 171, as saying:

> If Congress has erected inferior courts without saying in which cases a writ of error or appeals should lie from such courts to this, your argument would be irresistible; but when the Constitution has given Congress power to limit the exercise of our jurisdiction, and to make regulations respecting its exercise, and Congress, under that power, has pro-

> ceeded to erect inferior courts, and has said in what cases a writ of error or appeal shall lie, *an exception of all other cases is implied. And this court is as much bound by an implied as an express exception.* [Italics ours.]

See also *Kentucky* v. *Powers*, 201 U. S. 1, at page 24, where this Court said:

> We say, by any statute, because the subordinate judicial tribunals of the United States can exercise only such jurisdiction, civil and criminal, as may be authorized by acts of Congress. Chief Justice Marshall, speaking for this court, has said that "courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, can not transcend that jurisdiction." *Ex parte Bollman, &c.*, 4 Cr. 75, 93; *United States* v. *Hudson*, 7 Cr. 32, 33; *Cary* v. *Curtis*, 3 How. 236, 245; *McIntire* v. *Wood*, 7 Cr. 504, 506; *United States* v. *Eckford*, 6 Wall. 484, 488; *Sheldon* v. *Sill*, 8 How. 441, 449; *Jones* v. *United States*, 137 U. S. 202, 211; *The Sewing Machine Companies*, 18 Wall. 553, 571; *Holmes* v. *Goldsmith*, 147 U. S. 150, 158.

III

The decision of the Court of Customs Appeals was final

While the contention might be made herein that as the Court of Customs Appeals has directed a new trial in the instant case, the decision of that court

is not a final determination of the issues involved, and hence that this Court should refuse the writ of certiorari, it is apparent that if the Court of Customs Appeals has no jurisdiction to entertain such an appeal, the order granting the new trial is a nullity and the case in chief has been finally decided by the Board of General Appraisers. Certainly the question of the jurisdiction of the Court of Customs Appeals has been "finally" decided by that court itself and it is the final decision upon their jurisdiction that the Government desires to review.

It is true that this Court has held in several decisions that where an appellate court has remanded a case to the trial court for further proceedings in conformity with its opinion, the judgment of the appellate court was not final and hence not reviewable here. (*C. & N. Rwy. Co.* v. *Osborne*, 146 U. S. 354; *Meagher* v. *Minnesota Thresher Mfg. Co.*, 145 U. S. 608; *Rice* v. *Sanger*, 144 U. S. 197.) But in none of those cases was the appellate court called upon to determine its own jurisdiction, as in this case. The distinction is clearly brought out by this Court in *Macfarland* v. *Brown*, 187 U. S. 239, 245, where the Court said:

> In the present case no attack is made on the jurisdiction of either the Supreme Court of the District or *of the Court of Appeals.* [Italics ours.]

The finality of the judgment of the Court of Customs Appeals in the instant case must be tested by the principle laid down by Mr. Chief Justice Fuller

in *Hume* v. *Bowie*, 148 U. S. 245, where, at page 252, he said:

> This case comes before us on a motion to dismiss the writ of error for want of jurisdiction, upon the ground that the judgment brought here by the writ is not a final judgment. . . . The question involved is one of power, for if the court had power to make the order, when it was made, then it was not a final judgment, as it merely vacated the former judgment for the purpose of a new trial upon the merits of the original action. *If the court had no jurisdiction over that judgment, the order would be an order in a new proceeding, and in that view final and reviewable.* [Italics ours.]

See also *Phillips* v. *Negley*, 117 U. S. 665, 671, 672.

It follows, therefore, that if the Court of Customs Appeals was without jurisdiction to enter an order reversing the decision of the Board of General Appraisers and remanding the case for a new trial, that order was a final judgment and subject to review in this Court upon writ of certiorari.

CONCLUSION

It is respectfully submitted that the writ of certiorari for the purpose of reviewing the decision of the Court of Customs Appeals as to its jurisdiction should issue as prayed.

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WM. W. HOPPIN,
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